# In the Supreme Court of the United States

**OCTOBER TERM, 1939.**

## No. 896.

AMOS G. McCAMPBELL, JR.,
*Petitioner,*

vs.

THE WARRICH CORPORATION AND ROBERT EIGER,
Doing Business Under the Name and Style of
Eiger Realty Company,
*Respondents.*

**MOTION FOR CERTIORARI TO SUPPLY OMISSIONS FROM RECORD AND FOR ORDER FOR FURTHER PROOF.**

Petitioner moves this Honorable Court for certiorari to supply omissions from the record herein for the reason that, through no fault of petitioner herein, originals of important papers including pleadings, reports, and orders in *Bryant v. Charter Oak Life Insurance Company,* heretofore pending in the United States Circuit Court for the Northern District of Illinois, Northern Division thereof, as cause No. 16,059, judgment whereof is herein attacked, were missing from the Court file of said cause until the record had been completed in the District Court. Some of said documents were returned to the Court file and certified copies have been heretofore submitted at Exhibits O to S both inclusive, and others are submitted herewith by certified photostatic copies marked "Exhibit A 1." Of such papers the following papers heretofore submitted as a part of Exhibits O to S, both inclusive, or submitted herewith as a part of Exhibit A 1 were not available to tender as exhibits in the District Court:

| | | |
|---|---|---|
| * | 1/2/1884 | Supplemental Bill. |
| ** | 4/30/1885 | Original Answer. |
| ** | 12/23/1885 | Order. |
| * | 1/6/1886 | Order and Final Decree. |
| * | 8/11/1892 | Bill, Sup. Cross Bill. |
| ** | 8/16/1892 | Draft Order Granting Leave to File Bill. |
| ** | 11/25/1892 | Replication. |
| ** | 11/25/1892 | Answer of Minor Defendants. |
| ** | 6/22/1893 | Draft of Decree of Sale. |
| * | 10/2/1893 | Objection to Report of Sale. |
| ** | 12/2/1893 | Master's Report of Sale. |
| ** | 4/4/1895 | Master's Report. |

Note: * Papers heretofore tendered as Exhibits O to S inclusive.

** Papers tendered herewith as Exhibit A 1.

In support of this motion petitioner submits the affidavit of R. Ruthenberg dated September 30, 1940.

Petitioner states that by reason of the aforesaid such omissions could not have been cured before the record was filed.

Petitioner respectfully represents that said pleadings, reports and orders are essential to a fair, complete and impartial consideration by this Honorable Court of Petitioner's Motion for Rehearing pending herein and that said documents together with documents heretofore admitted as a part of transcript of record herein will show the facts stated in brief filed herewith.

Petitioner further moves this Honorable Court for an order for further proof, as provided within Rule 15 of the Rules of the Supreme Court of the United States.

CARMI A. THOMPSON,

ORVILLE SMITH,

*Attorneys for Petitioner.*

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

Amos G. McCampbell, Jr., petitioner herein, being first duly sworn at law, deposes and says that he knows the facts upon which the above motion is founded and that the same are true as he verily believes.

AMOS G. MCCAMPBELL, JR.

Sworn to before me and subscribed in my presence this 4th day of October, 1940.

ETHEL CUNIO,

(Seal) *Notary Public in and for Cuyahoga County, Ohio.*

My Commission Expires Mar. 25, 1943.

OCT 5 1940
CHARLES ELMORE CROPLEY
CLERK

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THE WARRICH CORPORATION AND ROBERT EIGER,
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Eiger Realty Company,
*Respondents.*

On Petition for Rehearing
Of Petition for Writ of Certiorari to
The United States Circuit Court of Appeals
For the Seventh Circuit.

## BRIEF IN SUPPORT OF PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION TO SUPPLY OMISSIONS FROM THE RECORD.

Carmi A. Thompson,
Orville Smith,
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The Gates Legal Publishing Co., Cleveland, Ohio

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## BRIEF IN SUPPORT OF PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION TO SUPPLY OMISSIONS FROM THE RECORD.

### JURISDICTION OF THIS COURT.

Petitioner represents that writ of certiorari should be granted herein for the reason that this case falls within the purview of Rule 38, Sec. 5(b) of the Rules of the Supreme Court of the United States as follows:

"Rule 38. * * *

5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

* * * * *

(b) Where a Circuit Court of Appeals has * * * so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

## QUESTION PRESENTED.

Remainders having been sold in foreclosure proceedings instituted on a mortgage of the fee executed by the owner prior to the conveyance creating such remainders and subjecting them to life estates, and the interests of the life tenants having been exempted from the foreclosure sale, and the remaindermen who were infants having been represented by a guardian *ad litem* who also represented the life tenants in the same proceedings, should this foreclosure sale be set aside in a separate proceeding brought for that purpose by one of the infant remaindermen?

## STATEMENT OF FACTS.

The realty in question here was conveyed by deed of James M. Bryant in 1866, and in said deed the following interests were created:

(1) Life estate in grantor;

(2) Life estate in children of grantor after his death; and

(3) Remainder interest in heirs of the bodies of grantor's children. (R. p. 31.)

At the time of the execution of said deed the real estate conveyed thereby was subject to a mortgage (Exhibit R) and in said deed reference was made to encumbrances and a recital stated that the conveyance was subject to such encumbrances.

The sale as to which complaint is made herein was had in foreclosure of this mortgage, in the Circuit Court of the United States for the Northern District of Illinois, Northern Division. In the original decree in the said proceed-

ings it was held that the entire property should be subjected to the payment of the debt. This appears in *Bryant vs. Charter Oak Life Insurance Company*, 24 Fed. Rep. 771, 773 (1885). This decision related to the claim of the life tenants that their interests were not subject to the mortgage. An appeal from this decision was dismissed by this Court, 136 U. S. 633 (1890). The proceeding below then went forward in foreclosure.

In the later proceedings the purchaser of the mortgage, Edward D. Mandell, filed a supplemental bill (Exhibit Q) and the purchaser of the life estates, Robert W. Hyman, filed an answer in the nature of a cross-petition (Exhibit A1, p. 16) stating that the claims of the infant remaindermen were separate from his interest as owner of the life estates and should be sold and be redeemable separately. The guardian *ad litem* did not answer this claim of the owner of the life estates.

From the records of the foreclosure proceedings it appears that the guardian *ad litem* for the infant remaindermen, Hugh L. Mason, had represented the life tenants prior to the sale of their interests to Hyman (Exhibit A1, p. 10) and had received a fee allowed by the court for said services. (Exhibit A1, p. 12.)

Under an order of sale preceding the final order under which the sale was made and confirmed (Exhibit A1, p. 22), the property was ordered sold exempting and excepting the life estates, and in the sale under that order a bid was received in excess of thirty-eight thousand dollars, being sufficient to pay the debt and the costs. The guardian *ad litem* for the infant remaindermen objected to the sale because it was made at the Federal Building instead of being made at the County Court House as provided by law. (Exhibit S.) The guardian *ad litem* did not object that his wards had been deprived of their interests while permitting the owner of the life estates to retain his interest.

This sale was set aside and the order was corrected to provide the proper place of sale but the final order under which the final sale was made contained the provision that the life estates were to be exempted from sale. (R. p. 50.) The legal notice and advertisement on this final order of sale provided for the sale of the property "with all and singular the tenements, hereditaments, and appurtenances thereunto belonging" (R. p. 26), and no exceptions were contained in the advertisement.

Sale of the premises was made under this final order to Edward D. Mandell, the owner of the mortgage (Exhibit A1, p. 26), and he purchased the life estates from Robert W. Hyman a short time later for a recited consideration of twenty thousand dollars. (Opinion C. C. A.)

The petitioner is a remainderman under said Bryant deed. He became of age August 16, 1903, and had been adjudged insane on May 23, 1901. He was adjudged of sound mind on April 3, 1936. The last surviving life tenant, Pattie B. Rowland, died August 8, 1934. (Opinion C. C. A.)

At the time of instituting the present proceedings in the United States District Court, many of the papers in the said mortgage foreclosure proceedings were missing from the files of the office of the Clerk of that Court. Only after repeated demands were some of those papers returned to the files. The statement included in petitioner's motion indicates some of the papers which were thus missing and have been returned, and petitioner believes that these papers are necessary fully to support his claims.

## ARGUMENT.

The opinion of the Circuit Court of Appeals in this cause states that the Bryant deed was executed on August 28, 1866, and that in January, 1872, Bryant executed a mortgage which was afterwards foreclosed and the property sold. The fact is that the mortgage had been executed before the Bryant deed and was one of the encumbrances mentioned in the deed as being an existing lien on the property.

With respect to the exemption of the life estates from the mortgage foreclosure sale, the opinion of the Circuit Court of Appeals states as follows:

> "Under this decree the property, except the life estates of the daughters, was sold to Mandell for the amount of the judgment on November 18, 1893, and on February 27, 1895, the master's deed therefor was delivered to Mandell. * * *
>
> "Mandell was foreclosing his mortgage and he purchased at the foreclosure sale. It is true that he purchased only the interest which was sold, but that was the entire interest except the life estates which Hyman owned."

The opinion then states that the remaindermen did not purchase the property and took no action whatever. Certainly the remaindermen could not reasonably have been expected to buy their own interests, as the purchaser of the life estates was permitted to retain possession of the property and thus the income from the property could not be used for the purposes of redemption. It is clear that the remaindermen were thus fraudulently deprived of their rights and neither the guardian *ad litem* who had previously represented the life tenants in the same proceeding nor the court protected the infant remaindermen against this injustice.

The petitioner had no right of action until the death of the last of the life tenants in 1934, and the limitation period under Chapter 83 of the Illinois Annotated Statutes, Section 4, heretofore quoted,* is seven years.

Supplementing the briefs heretofore filed by counsel for the petitioner, we wish to cite the decision of the Supreme Court of Illinois in *C. P. & St. L. Ry. Co. v. Vaughn*, 206 Ill. 234, 240 (1903), in which the following appears:

> "The possession of land by a tenant for life cannot be adverse to the remainderman or reversioner; and if he conveys to a third person by words purporting to pass the absolute property, the possession of the

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* Page 22, Brief in Support of Petition for Writ of Certiorari.

purchaser is not, during the continuance of the life estate, adverse to the remainderman or reversioner. The Statute of Limitations does not run against the remainderman or reversioner, until after the life estate falls in, and it is only after the latter event occurs, that the possession will be adverse to the remainderman or reversioner. The possession of the tenant for life, or his vendee, during the continuance of the life tenancy, is, in contemplation of law, the possession of the remainderman or reversioner. The latter cannot, during the life of the person for whose life the life estate is, bring an action against the person in possession under such life tenancy to recover possession of the premises. 'No laches can be imputed to one who has no remedy or right of action, and to hold the bar of the statute could run against the title of a person so circumstanced, would be subversive of justice and would be to deprive such person of his estate without his day in court.' (*Turner v. Hause*, 199 Ill., 464; *Mettler v. Miller*, 129 id. 630; *Rohn v. Harris*, 130 id. 525; *Higgins v. Crosby*, 40 id. 260.)"

To the same effect is *Gibbs vs. Gerdes*, 291 Ill. 490.

The rule as to an original action is stated in *Jones on Mortgages*, Vol. 3, at page 650, as follows:

> "A sale under a decree of foreclosure may be set aside by a bill in equity brought for the purpose, when the sale has been fraudulently conducted to the prejudice of the plaintiff even when he might have a remedy by motion in the original suit."

As to an original proceeding when the rights of third persons have intervened, this author says at page 651:

> "When the rights of third persons have accrued, some original proceeding is necessary in which these rights may be tried in the ordinary way; they can not be adjudicated in a summary manner upon motion. They must in some way be brought into court, and given an opportunity to be heard."

No question of rights of purchasers without notice is presented here, as the case below was dismissed on motion.

Petitioner, by his counsel, represents to this Honorable Court that certiorari to supply omissions from the record should be granted.

In *Morgan v. Curtenius,* 19 How. 8 (1857), this Court issued certiorari, directed to the Judges of the Circuit Court of the United States for the District of Illinois, directing it to supply a certain omission and return a full and correct transcript to this Court.

In *Watts, Watts and Company, Limited v. Unione Austriaca Di Navigazione, etc.,* 248 U. S. 9 (1918), this Court said in part in its opinion at page 21 as follows:

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. *Butler v. Eaton,* 141 U. S. 240, 35 L. ed. 713, 11 Sup. Ct. Rep. 985; *Gulf, C. & S. F. R. Co. v. Dennis,* 224 U. S. 503, 506, 56 L. ed. 860, 861, 32 Sup. Ct. Rep. 542. And in determining what justice now requires, the court must consider the changes in fact and in law which have supervened since the decree was entered below."

This Court stated the following principle of decision in its opinion in *Patterson v. Alabama,* 294 U. S. 600 (1935) at page 607:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

This Court held in part in *Camp etc. v. Grass,* 250 U. S. 308 (1919), at page 318, as follows:

> "In cases coming from Federal courts, the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal

or writ of error (or certiorari, Sec. 240 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, Sec. 1217, 5 Fed. Stat. Anno. 2d ed. p. 854]) requires. Revised Statutes, Sec. 701, Comp. Stat. 1916, Sec. 1669, 6 Fed. Stat. Anno. 2d ed. p. 224, Circuit Court of Appeals, Act of March 3, 1891, chap. 517, Sec. 11, 26 Stat. at L. 826, 829."

In denying appellants' motion for commission to take the testimony of certain witnesses under facts in no way comparable to the present operative facts, this Court made the following statements relating to such motion in *The Steam Tug R. S. Mabey etc. v. Atkins et al., etc.*, 13 Wall. 738 (1871), at pp. 740-741:

> "Application for the same purpose as that described in the motion (motion for commission to take the testimony of certain witnesses) was made to this court by the appellants, on a prior occasion during the present term of the court; but it was refused, as no excuse was shown, in the petition or accompanying papers, why the witnesses were not examined either in the district or circuit courts, and the court said some excuse should be shown, satisfactory to this court, for the failure to examine them in the courts below; such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpoenaed and failed to appear, and could not be reached by attachment, and the like." See also 14 *American Jurisprudence*, page 461.

Here the evidence was not available.

Summarizing, we submit that the purported sale under said foreclosure proceedings was a nullity, as the Court was without jurisdiction to exempt the interests of part of the owners of the real estate while attempting to sell the interests of the other owners; that this action is for a declaration of petitioner's title to eleven-sixtieths of the property involved and should not be considered as a collateral attack upon a procedure which is null and void; that the fraud of the guardian *ad litem* in representing con-

flicting interests as well as the discrepancy between the advertisement and the sale of the property clearly support petitioner's claim that the attempted sale was void and of no effect whatsoever and that the petitioner should be granted the right to complete the record, which will fully show petitioner's rights.

Respectfully submitted,

CARMI A. THOMPSON,
ORVILLE SMITH,
*Attorneys for Petitioner.*

(16)

FILED
OCT 9 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939.

## No. 896

AMOS G. McCAMPBELL, JR.,

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*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## SUGGESTIONS BY RESPONDENTS IN OPPOSITION TO MOTION OF PETITIONER FOR CERTIORARI TO SUPPLY OMISSIONS FROM RECORD, AND OPPOSING BRIEF TO BRIEF IN SUPPORT OF PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION TO SUPPLY OMISSIONS FROM THE RECORD.

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## SUMMARY OF ARGUMENT.

I. Petitioner is not entitled to introduce, for the first time, in this Court matter not in evidence in the *nisi prius* court. (*Infra*, page 3.)

II. Even if this evidence were now offered in the *nisi prius* court instead of in this Court of Appeal, as it is, it could still not be received even there, as no diligence is shown in not having discovered it in time to present it in the *nisi prius* court in proper time. (*Infra,* page 6.)

III. The alleged new evidence could not change the result. (*Infra,* page 7.)

IV. Counsel for petitioner persist in the erroneous position that the rule applicable here is that which obtains in the case of a remainderman who seeks to oust a disseisor. On the contrary, the rule applicable here is that which controls when an infant seeks to set aside a decree in a case to which he was a party. (*Infra,* page 7.)

V. Counsel for petitioner have still not shown a case of the type which the Supreme Court of the United States will entertain on petition for certiorari. (*Infra,* page 8.)

## ARGUMENT.

Respondents respectfully suggest to the Court that the motion of petitioner, for certiorari to supply omissions from the record and for an order for further proof, should be denied, and in support of that contention respectfully submit to the Court the suggestions following, and the answers, also following, to the additional brief which petitioner now presents under the heading "Brief in Support of Petition for Rehearing of Petition for Writ of Certiorari and in Support of Motion to Supply Omissions from the Record."

### I.

PETITIONER IS NOT ENTITLED TO INTRODUCE, FOR THE FIRST TIME, IN THE SUPREME COURT OF THE UNITED STATES, MATTER NOT IN EVIDENCE IN THE NISI PRIUS COURT.

The motion which petitioner now makes as a motion to supply "omissions from record" is incorrectly phrased. It is not a motion to supply omissions from the record. Instead, it is a motion to introduce in the Supreme Court of the United States, for the first time, evidence which petitioner failed to introduce before the *nisi prius* court. While the evidence thus sought to be introduced by him now for the first time in this Court, consists of records of a cause, they are not any part of the record of the cause as to which the petition for writ of certiorari has been filed. The records which petitioner seeks to bring before the Court are the records in a separate and independent cause, a foreclosure suit that was brought in the Circuit Court in which a final decree was entered in the year 1893. It is, therefore, plainly and simply an

effort to introduce new evidence in this Court. That that is not permissible must be apparent from the authorities which respondents cited on page 4 of the answer filed by them to petitioner's original petition for rehearing, to which these respondents respectfully direct the attention of the Court.

But petitioner now sets up various cases which he urges as requiring this Court to entertain evidence thus for the first time brought to the attention of any of the courts in this cause. However, the cases that he cites are not at all in point, and do not sustain his contention. The first of those cases, *Morgan* v. *Curtenius,* (1857) 60 U. S. (19 How.) 8, was one where a document which had in fact been introduced in evidence below had been omitted from the transcript which was brought to the court above. As shown above, that is not the case here. The next case petitioner cites, *Watts, Watts & Co.* v. *Unione Austriaca, etc.,* (1918) 248 U. S. 9, was one where this Court merely took judicial notice of the fact that the World War had commenced after the cause had been instituted below, the effect of which was to render one of the parties incapacitated from properly representing its case.

No such situation is presented in the case at bar. The District Court in this cause could have taken judicial notice of any papers in the same cause, but it could not take judicial notice of papers in another cause. *The People* v. *Carr,* (1914) 265 Ill. 220, at page 229, and the authorities there cited. If the District Court itself could not take judicial notice of any papers in another cause, even though that cause had been prosecuted before it, much less can the Court of Appeal take judicial notice of papers and records in another cause, as counsel for petitioner seek to have it do in this case.

The next case petitioner cites is *Patterson* v. *Alabama,* (1934) 294 U. S. 600, and it is similar in effect to the

case of *Watts, Watts & Co.* v. *Unione Austriaca, etc.*, (1918) 248 U. S. 9, just referred to. Petitioner omitted important language from the matter he quotes from *Patterson* case, thus:

> "We are not satisfied that the [State] court would have dealt with the case the same way if it had determined the constitutional question as we have determined it. * * * At least the state court should have an opportunity to examine its powers in the light of the situation which has now developed."

In other words, the change which the Supreme Court of the United States took notice of, was its own decision to the effect that the accused had been denied a constitutional right. That decision of the Supreme Court of the United States accomplished a change in the law subsequent to the time when the State Court had reacted to the case, of which the Supreme Court of the United States had notice and of which the State Court had no notice, and so the cause was returned to the State Court to react to the case in the light of the law which the Supreme Court of the United States had then just laid down. No such situation is presented in the case at bar.

The next case counsel for petitioner cite, *Camp* v. *Grass*, (1919) 250 U. S. 308, holds merely that the Conformity Act, requiring practice to be followed conformable to that in the State Court, does not apply to the Supreme Court of the United States. No contention is made here, either by petitioner or respondents, that raises any such question.

Finally, petitioner cites the case of *The Mabey*, (1871) 80 U. S. (13 Wall.) 738. This was an admiralty case, and counsel in citing it have quite overlooked, apparently, the peculiar rule that obtains in admiralty cases. For in an admiralty case the Court of Appeal treats the case as a new trial and, therefore, entertains new evidence and new pleadings where such are offered. *The Saun-*

*ders,* (1885) 23 Fed. 303; *The Philadelphian,* (1894) 60 Fed. 423, 426.

Even so, *The Mabey* case denied the application of the petitioner there to introduce new evidence for the first time in the Supreme Court of the United States, and it therefore holds contrary to what petitioner cites it for here. Indeed, that case cites the case of *The William Bagaley,* (1866) 72 U. S. (5 Wall.) 377, at page 412, in which this Court said:

> "Evidently the application in this case is in its nature original, and not appellate and it is well settled that this court has no original jurisdiction in prize causes. Such an application cannot be first presented in this court and allowed, because it would be assuming jurisdiction not granted either by the Constitution or the laws of Congress."

## II.

PETITIONER HAS SHOWN NO DILIGENCE IN HIS FAILURE TO INTRODUCE SUCH EVIDENCE IN THE NISI PRIUS COURT.

Even if the alleged newly discovered evidence which petitioner now seeks to present for the first time in this Court, were being offered in the *nisi prius* court instead, it could still not be received because no diligence is shown to have been exercised by petitioner in attempting to discover it in time for presentation below in due season. According to his own showing, petitioner became diligent only after the Circuit Court of Appeals decided against him. Thereby, far from making any show of diligence, he shows positive negligence. *M'Leod* v. *City of New Albany,* (1895) 66 Fed. 378, 381, 382.

## III.

THE ALLEGED NEW EVIDENCE COULD NOT CHANGE THE RESULT.

Furthermore, the evidence is merely cumulative. That the mortgage was made before instead of after the deed of 1866, as counsel now contend (see page 2 of "Brief in Support of Petition for Rehearing of Petition for Writ of Certiorari and in Support of Motion to Supply Omissions from the Record"), is quite immaterial. Indeed, in the original petition for rehearing, petitioner contended not only that the mortgage was made after the deed of 1866, but that the life tenants had joined in it; and petitioner made much of his contention that the life tenants had joined in the mortgage.

The further alleged new evidence, to the effect that the guardian ad litem had represented the life tenants before they sold their interests to Hyman, is also quite immaterial, as must appear from the top of page 18 of the brief which respondents filed opposing the original petition for a writ of certiorari, as there respondents point out that even if no guardian ad litem had been appointed at all, it would not change the situation.

## IV.

THE RULES APPLICABLE TO THE TIME WITHIN WHICH A REMAINDERMAN MAY OUST A DISSEISOR DO NOT APPLY TO AN EFFORT BY A PARTY TO A SUIT, EVEN THOUGH AN INFANT, TO SET ASIDE THE DECREE ENTERED IN THAT SUIT.

Counsel in their latest brief (Brief in Support of Petition for Rehearing of Petition for Writ of Certiorari and in Support of Motion to Supply Omissions from the Record) persistently ignore, just as did the other counsel,

the situation presented by this cause. For, confronting the petitioner, is a decree of court entered October 2, 1893, in a cause in which the petitioner was concededly a party. The court will note that when respondents in their answer to the original brief filed by petitioner in support of the petition for certiorari called attention to the misstatement which petitioner made to the effect that the petitioner had not been a party to the old foreclosure suit, petitioner in his reply to respondents' answer, at the bottom of page 2 thereof, said:

> "The infant remaindermen were unquestionably before the court in the foreclosure proceedings * * *."

In such case the law which applies is that relative to the time when petitioner may come in to assail a decree, and not the law applicable to the time within which a person may eject or oust a disseisor who has dispossessed him. Respondents have cited ample authority bearing out this distinction (see pages 11 to 13 of respondents' "Brief Opposing Petition for Writ of Certiorari"), and the Circuit Court of Appeals has held accordingly. (C. C. A. 7th, 109 Fed. (2d) 115, at page 118.) Petitioner has not cited a single authority to the contrary.

## V.

PETITIONER, EVEN WITH THE ALLEGED NEW EVIDENCE, HAS STILL NOT SHOWN A CASE OF THE TYPE WHICH THE SUPREME COURT OF THE UNITED STATES WILL ENTERTAIN ON PETITION FOR CERTIORARI.

The Court is respectfully directed to page 7 of respondents' "Brief Opposing Petition for Writ of Certiorari." It is respectfully submitted counsel for petitioner have failed utterly to answer the matters there appearing.

## Conclusion.

Respondents respectfully refer again to the fact that this case involves a controversy that was disposed of 40 years ago, and that public policy dictates that there be an end of litigation sometime. (See page 5 of "Answer by Respondents to Petitioner's Petition for Rehearing on Denial of his Petition for Writ of Certiorari.") That time, it is submitted, has long passed.

Respectfully submitted,

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